

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
THE PEOPLE OF THE STATE OF NEW YORK,
by LETITIA JAMES, Attorney General of the State of
New York,

Plaintiff,

-against-

UNITED STATES DEPARTMENT OF LABOR,

Defendant.
----- X

Case No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

I. NATURE OF ACTION

1. The State of New York brings this lawsuit to compel compliance by the United States Department of Labor with the Freedom of Information Act in connection with the Department's launch of a non-enforcement initiative for wage theft violations. In March 2018, Defendant United States Department of Labor ("USDOL") announced a non-enforcement initiative called the Payroll Audit Independent Determination ("PAID") Program that appears to allow employers to avoid prosecution and penalties under federal wage laws if they self-identify and pay any back wages owed to their workers. In December 2018, the State of New York ("New York") submitted a request under the Freedom of Information Act ("FOIA") in order to obtain information about USDOL's implementation of its PAID Program and to identify the employers that sought to participate in the Program. The USDOL has violated FOIA by failing to respond to New York's request within the statutorily prescribed time limit, failing to disclose the requested documents, and unlawfully withholding the requested information. New York now

asks the Court to order Defendant USDOL to respond to the request and to disclose all responsive records improperly withheld from New York.

This case follows close on the heels of a related FOIA lawsuit that New York brought against USDOL in August 2018 after USDOL failed to properly respond to New York's initial FOIA request concerning the development and plans for implementation of the PAID Program. In that case, USDOL failed to comply with its statutory requirements to provide New York with the requested documents – until it was under court order to do so. Now, New York once again files suit to compel USDOL to comply with its statutory obligations under the Freedom of Information Act.

II. JURISDICTION AND VENUE

2. This Court has subject-matter jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

3. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*

4. Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

III. PARTIES

5. Plaintiff State of New York is represented by its Attorney General, Letitia James, with a principal place of operation at 28 Liberty Street, 15th Floor, New York, New York 10005.

6. Defendant USDOL is the federal department that oversees working conditions and work-related benefits and rights, and is an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). USDOL is headquartered at 200 Constitution Avenue, NW, Washington, D.C. 20210, and its New York Regional Office is located at 33 Whitehall Street, New York, NY 10004.

IV. STATUTORY FRAMEWORK

7. FOIA promotes open government by providing every person with a right to request and receive federal agency records. 5 U.S.C. § 552(a)(3)(A).

8. In furtherance of its purpose to encourage open government, FOIA imposes strict deadlines on agencies to provide responsive documents to FOIA requests. *Id.* § 552(a)(6)(A).

9. An agency must comply with a FOIA request by issuing a determination within 20 business days after receipt of the request. *Id.* § 552(a)(6)(A)(i).

10. The determination “must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.” *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm’n*, 711 F.3d 180, 186 (D.C. Cir. 2013).

11. An agency may be entitled to one ten-day extension of time to respond to a request if it provides written notice to the requester explaining that “unusual circumstances” exist that warrant additional time. 5 U.S.C. § 552(a)(6)(B).

12. An agency must immediately notify the requester of its determination whether to comply with a request, and the reasons for it, and of the right of such person to appeal an adverse determination. *Id.* § 552(a)(6)(A)(i).

13. An agency’s failure to comply with any timing requirements is deemed constructive denial and satisfies the requester’s requirement to exhaust administrative remedies. *Id.* § 552(a)(6)(C)(i).

14. A FOIA requester who exhausts administrative remedies may petition the court for injunctive and declaratory relief from the agency’s continued withholding of public records. *Id.* § 552(a)(4)(B).

V. FACTS

15. On December 6, 2018, Plaintiff New York sent a FOIA request by electronic submission to USDOL (the “Request”; attached hereto as Exhibit A). The Request sought records from six USDOL components: the Office of the Secretary, the Office of the Solicitor, the Office of Congressional and Intergovernmental Affairs, the Wage and Hour Division, the Executive Secretariat, and the Office of the Assistant Secretary for Policy (the “Policy Office”). The Request sought records in three general categories: (1) records concerning the employers who participated in the PAID Program; (2) records of internal or external meetings or communications concerning the PAID Program; and (3) records reflecting meetings or communications with any member of the USDOL’s Chief Evaluation Office (located within the Policy Office) concerning the development, implementation, consideration, or evaluation of the PAID Program. (*See* Exhibit A.)

16. On December 20, 2018, the Wage and Hour Division confirmed receipt of the Request by email to New York, and assigned it tracking number 871403. The Wage and Hour Division’s confirmation email did not seek an extension of time to respond pursuant to 5 U.S.C. § 552(a)(6)(B), or provide a timeframe for a response to the Request. (*See* Exhibit B.)

17. On December 27, 2018, the Policy Office sent a letter to New York reporting that its search for records produced three pages of responsive documents, which the Policy Office was withholding pursuant to 5 U.S.C. § 522(b)(5). (*See* Exhibit C.)

18. On January 17, 2019, New York received an acknowledgment letter, also referencing tracking number 871403, from the Office of the Assistant Secretary for Congressional and Intergovernmental Affairs. The letter did not seek an extension of time to

respond pursuant to 5 U.S.C. § 552(a)(6)(B), and did not otherwise provide a timeframe for a response to the Request. (*See* Exhibit D.)

19. On February 12, 2019, the Wage and Hour Division sent an e-mail to New York reporting that the sorting of potentially responsive documents “may take several more weeks,” but did not otherwise provide a timeframe for a response to the Request. (*See* Exhibit E.)

20. New York has not received any communications from USDOL subsequent to the February 12, 2019 email from the Wage and Hour Division.

21. USDOL has not produced any documents in response to the Request. USDOL has not objected to the Request. Other than the response from the Policy Office, no USDOL component has provided any grounds for withholding the records sought.

22. Because five of the six USDOL components have failed to provide any substantive responses to the Request within the statutory timeframe, USDOL has constructively denied the Request. As such, New York has exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

23. New York has a legal right to the requested records. USDOL has improperly withheld those records, forcing New York to file this lawsuit to enforce its right under FOIA.

24. As chief law enforcement officer of New York State, responsible for protecting the safety, welfare, and legal rights of its residents, including workers in New York, it is of particular importance for the Attorney General to understand how the USDOL’s non-enforcement program has worked in practice and its effect on the residents of New York. Among other things, the Attorney General seeks to ensure that New York employers enrolled in the program for violations of federal wage and hour laws, have also paid their employees the wages they are owed under the higher New York State wage rates.

VI. STATEMENT OF CLAIMS

Count I: Failure to Respond to Request Within Statutory Timeframe

25. Plaintiff New York re-alleges and incorporates the foregoing paragraphs as if set forth in full.

26. Defendant USDOL failed to respond to the Request within the statutorily mandated timeframe, in violation of Plaintiff New York's rights under FOIA, including but not limited to 5 U.S.C. § 552(a)(6)(A)(i) and (a)(6)(B).

Count II: Failure to Produce Responsive Records

27. Plaintiff New York re-alleges and incorporates the foregoing paragraphs as if set forth in full.

28. Defendant USDOL failed to make reasonable efforts to search for records responsive to the Request, in violation of Plaintiff's rights under FOIA, including but not limited to 5 U.S.C. § 552(a)(3).

29. Defendant USDOL failed to disclose and produce any records responsive to the Request, in violation of Plaintiff's rights to those records under FOIA, including but not limited to 5 U.S.C. § 552(a)(3)(A).

30. Defendant USDOL failed to disclose and produce records responsive to the Request without a legal basis for withholding such records, in violation of FOIA, including but not limited to 5 U.S.C. § 552(a)(3)(A) and (a)(6)(A).

31. Plaintiff New York is entitled to its reasonable attorneys' fees and costs under 5 U.S.C. § 552(a)(4)(E).

PRAYER FOR RELIEF

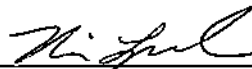
WHEREFORE, the State of New York requests that this Court:

- (a) Find that Defendant's failure timely to respond or disclose records was unlawful;
- (b) Order Defendant to search for and promptly disclose all records responsive to Plaintiff's Request;
- (c) Award Plaintiff attorneys' fees and costs; and
- (d) Grant such other relief as the Court may deem just and proper;

Respectfully Submitted,

LETITIA JAMES
Attorney General
State of New York

By:



ReNika Moore, Bureau Chief
Julie Ulmet, Assistant Attorney General
Kevin Lynch, Assistant Attorney General
Labor Bureau
Office of the New York State Attorney General
28 Liberty Street, 15th Floor
New York, NY 10005
Phone: (212) 416-6280
Fax: (212) 416-8694
ReNika.Moore@ag.ny.gov
Julie.Ulmet@ag.ny.gov
Kevin.Lynch@ag.ny.gov

Dated: March 1, 2019